Supreme Court, U. S.
FILED
SEP 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-1551

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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**NATIONAL COMMISSION ON EGG NUTRITION,**
*Petitioner,*

vs.

**FEDERAL TRADE COMMISSION,**
*Respondent.*

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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## SUPPLEMENTAL BRIEF FOR PETITIONER

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## SUPPLEMENTAL BRIEF FOR PETITIONER

### Argument

Pursuant to Supreme Court Rule 24(5), Petitioner National Commission on Egg Nutrition hereby advises the Court of *Metpath* v. *Imperato*, 450 F. Supp. 115 (S.D. N.Y. 1978) (S. App. 1-11) a decision not available at the time Petitioner filed its Petition for Writ of Certiorari.

In *Metpath* a municipal government contended that it could constitutionally prohibit accurate, non-deceptive informational statements about diet and heart disease when uttered in commercial advertisements by clinical laboratories. The text of the challenged advertisements included the statement that "the amount of a certain type of cholesterol, known as high density lipoprotein ("HDL"), in the blood is related to an individual's susceptibility to heart disease." (S. App. 2) Specifically, the advertisements asserted:

> "The encouraging thing about HDL is that it apparently protects people against heart disease" (S. App. 12).

and

> "This Eskimo is High on HDL . . . It's a type of cholesterol (high density lipoprotein) that apparently protects people from heart disease" (S. App. 12).

and

> "For once, a high level of something is good for you." (S. App. 12).

Relying on *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976) and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), the district court held that restraint of such truthful, non-deceptive speech on cholesterol and heart disease abridges First Amendment guarantees. (S. App. 10).

*Metpath* illustrates the very type of truthful, non-deceptive advertising commentary on the cholesterol heart disease question which, in the judgment of Petitioner and now of a district court, cannot be constitutionally restrained but which the present order would nonetheless prohibit.



See, e.g. illustration 6 in footnote 7 of Petition. *Metpath* therefore underscores the present order's unconstitutional overbreadth.

Moreover, inasmuch as the government insists that this is not a corrective advertising case (Brief in Opp. 9), *Metpath* cannot be distinguished on the grounds that *Metpath*-type discussion of cholesterol and heart disease would, unless qualified, mislead in the present case because of some lingering effect of Petitioner's past publications.

## Conclusion

For the reasons given in the Petition and on the authority of *Metpath*, the writ of certiorari should issue.

Respectfully submitted,

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# APPENDIX

## SUPPLEMENTAL APPENDIX

METPATH INC., Plaintiff,

v.

Pascal IMPERATO, M.D., as Commissioner of the Department of Health of the City of New York and Chairman of the Board of Health of the City of New York, the Department of Health of the City of New York, and the Board of Health of the City of New York, Defendants.

No. 78 Civ. 1016 (JMC).
United States District Court,
S. D. New York.
April 17, 1978.

OPINION

CANNELLA, *District Judge.*

After a bench trial, advanced and consolidated with the hearing on plaintiff's application for a preliminary injunction, the Court declares unconstitutional New York City Health Code § 13.21(h) ["the regulation"] and enjoins defendants from enforcing the ban on advertising by clinical laboratories contained in that regulation.[1]

Jurisdiction is based upon the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3).

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[1] Pursuant to the New York City Charter, the New York City Health Code "shall have the force and effect of law." N.Y.City Charter § 558(a) (1977). The provisions of the City Health Code are enacted by the Board of Health of the New York City Department of Health and are more akin to "regulations" than to "statutes," the latter term implying legislative action. *See* N.Y.City Charter § 558(b), (c), (e), (f) (1977).

## FACTS

The regulation challenged in this suit provides in full text:

> A clinical laboratory shall not advertise for patronage to the general public by means of bills, posters, circulars, letters, newspapers, magazines, directories, radio, television, or through any other medium.

N.Y.C. Health Code § 13.21(h) (1973).

Plaintiff Metpath Inc. ["Metpath"] is a New York corporation, with its principal place of business in New Jersey, and is a "clinical laboratory" within the meaning of the regulation. During January and February of 1978 Metpath sought permission from defendants to publish a certain advertisement[2] in a newspaper of general circulation within the City of New York. The text of the advertisement states that the amount of a certain type of cholesterol, known as high density lipoproteins ["HDL"], in the blood is related to an individual's susceptibility to heart disease. The advertisement also states that Metpath can perform a laboratory test to measure HDL levels in the blood and concludes with the statement: "And even though all laboratory tests must be ordered by a physician, we thought you should know something about us."[3]

Defendants responded to Metpath's inquiries that publication of the advertisement would be a violation of the

[2] Metpath actually sent defendants two slightly different proposed advertisements. Affidavit of Gary J. Cohan ¶ 10, at 6, *Metpath Inc.* v. *Imperato*, No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed March 8, 1978). Both advertisements are included as Appendices A and B to this Opinion. The Court deems the differences in these advertisements immaterial to the resolution of this dispute.

[3] Appendix A; *see* note 2 *supra*.



regulation and could result in revocation of Metpath's clinical laboratory permit as well as criminal prosecution.[4]

Based upon defendants' negative response, Metpath commenced the instant suit, by order to show cause, seeking to declare the regulation unconstitutional. On consent of the parties, trial on the merits was advanced and consolidated with the hearing on Metpath's application for a preliminary injunction. Fed.R.Civ.P. 65(a)(2).

At a meeting of the New York City Board of Health held subsequent to the filing of this action, its members officially decided that Metpath's publication of the proposed advertisement, in a newspaper of general circulation within the City of New York, would violate the regulation.

## DISCUSSION

[1] A series of recent Supreme Court opinions establishes beyond peradventure that "commercial" speech is entitled to the protections of the first amendment to the Constitution.[5] In the most recent of these opinions, Mr. Justice Blackmun, speaking for the Court, observed

> that our cases long have protected speech even though it is in the form of a paid advertisement; in a form that is sold for profit; or in the form of a solicitation to pay or contribute money. If commercial speech is

[4] *See* N.Y.Health Code §§ 3.07, 3.12, 13.33(a)(7) (1973); N.Y. City Charter § 558(d) (1977) ("Any violation of the health code shall be treated and punished as a misdemeanor. . . .").

[5] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2591, 53 L.Ed.2d 810 (1977); *Linmark Associates* v. *Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

to be distinguished, it "must be distinguished by its content." But a consideration of competing interests reinforce[s] our view that such speech should not be withdrawn from protection merely because it propose[s] a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. The listener's interest is substantial; the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision-making.

*Bates* v. *State Bar of Arizona,* 433 U.S. 350, 363-64, 97 S.Ct. 2691, 2698, 53 L.Ed.2d 810 (1977) (citations omitted), *quoting Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

The task for the Court is to assess the public first amendment interest in the free flow of the information contained in Metpath's advertisement and to determine whether that interest is outweighed by the public interest allegedly served by the regulation. *Bigelow* v. *Virginia,* 421 U.S. 809, 826, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).[6]

[6] See, in this regard, the comments of Mr. Justice Black in *Time, Inc.* v. *Hill,* 385 U.S. 374, 400, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (Black & Douglas, JJ., concurring).



Both Metpath and the public have significant first amendment interests in the free flow of information concerning the relationship between heart disease and HDL levels in the blood. First, the Metpath advertisement contains information concerning scientific studies of "general public interest." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 764-65, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Second, Metpath's economic interest in advertising its services does not disqualify it from protection under the first amendment. *Id.* at 762-63, 96 S.Ct. 1817. Third, the free flow of information concerning the availability of services is essential to the individual economic decisions that form the basis of our free enterprise system. *Id.* at 765, 96 S.Ct. 1817. Finally, defendants have conceded for the purpose of this proceeding that the contents of Metpath's advertisement are factually accurate. [7]

Defendants argue that, since the regulation does not prohibit Metpath from advertising in medical or scientific journals, the regulation should be viewed as a restriction on the "time, place, or manner of speech." See *Linmark Associates* v. *Willingboro,* 431 U.S. 85, 93-94, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977). It is clear, however, that the regulation is not directed at the form of speech but rather at the identity of the listener: all advertising to the general public is proscribed. Similarly, Metpath's ability to communicate directly with physicians cannot be deemed an alternative method of communicating with the general public. Individuals who do not see a doctor would be deprived of the information entirely. Others would not receive the information until their next doctor visit and then, only if the physician chose to disclose it.

[7] Transcript of proceedings, at 14, *Metpath Inc.* v. *Imperato,* No. 78 Cic. 1016 (JMC) (S.D.N.Y., April 10, 1978) [hereinafter cited as "Hearing Transcript"].

There remains the task of determining whether these first amendment interests are outweighed by the public interest allegedly served by the regulation. Defendants argue that the evil the regulation seeks to prevent is

> the alluring promise of relief, the raising of false hopes, the persuading of a doctor to run a test which in his opinion is not needed, will not help [the doctor] diagnose the patient any more and won't tell him a darn thing different to do about how he should treat the patient.[8]

*Citing Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 612, 55 S.Ct. 570, 79 L.Ed. 1086 (1935), defendants contend that the regulation is a valid exercise of the state's police power.

Initially, the Court does not deem a legitimate public interest the protection of doctors from annoying inquiries by their patients. In any event, this alleged public interest is clearly outweighed by the interests protected by the first amendment.

Defendants' reliance on the forty-three year old Supreme Court opinion in *Semler, supra,* is misplaced, since the state's interest in insulating the public from "false hopes" is not at issue in this dispute. All concede that false, deceptive, or misleading advertising is not protected by the first amendment,[9] but defendants maintain that they may

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[8] Hearing Transcript, *supra* note 7, at 11.

[9] *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Warner-Lambert Co.* v. *FTC,* 562 F.2d 749, 758-59 (D.C.Cir. 1977); N.Y.Gen. Business Law § 350 (McKinney 1968); N.Y.Penal Law § 190.20 (McKinney 1975).



legitimately prohibit clinical laboratories from disseminating completely accurate information to the general public.[10] Additionally, no first amendment claim was presented to the Court in *Semler,* and it is questionable whether the Court would reach the same result were the *Semler* case to be decided today.[11]

[2] Defendants next argue that Metpath's publication of the advertisement would constitute an attack on other provisions of the Health Code. These other regulations[12] provide that clinical laboratories may conduct tests only at the request of a licensed physician and that the results of such tests may be reported only to the doctor who authorized them.[13] The validity or wisdom of these restrictions is irrelevant to the instant dispute. Metpath dis-

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[10] *See* Hearing Transcript, *supra* note 7, at 14.

[11] *See* note 5 *supra.*

[12] N.Y.City Health Code § 13.21(b), (c) (1973).

[13] Throughout this proceeding the bulk of defendants' argument in support of the regulation has been based upon this provision of the Health Code. For example, a representative of defendant Board of Health interpreted Metpath's position as follows:

> It seems to me that Metpath is questioning the wisdom of the provision of the Health Code requiring a physician's order for a particular test and instead seems to claim that perhaps the average layman is competent enough to know whether he needs an HDL test and to request his physician to have such a test made. Clearly, the average layman is not competent to know what test should be done and the average layman is not competent to properly evaluate the results of such a test.

Affidavit of Bernard Davidow ¶ 11, at 6, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed April 4, 1978).

claims any challenge to these other regulations[14] and in fact includes in its proposed advertisement that "all laboratory tests must be ordered by a physician."[15]

[3] Finally, in a somewhat related argument, defendants attempt to justify the regulation as follows:

> The interest served is to protect the health and the purse of the private citizen as well as the public treasury, by not permitting the clinical laboratories to determine what clinical tests to perform on a person and also to prevent unnecessary and useless tests that the clinical laboratory would perform in order to reap financial profits.[16]

Assuming, without deciding, that the state has a legitimate interest in determining the type of medical testing or treatment it will allow to be performed on its citizens, *cf. Rizzo* v. *United States,* 432 F.Supp. 356, 358 (E.D.N.Y. 1977) (Cosantino, J.), that interest is not advanced by the regulation challenged in this suit. A lifting of the advertising ban would neither permit "the clinical laboratories to determine what clinical tests to perform on a person" nor permit them to perform "unnecessary and useless tests." Defendants' regulatory scheme allows only licensed physicians to authorize clinical laboratory tests; if defendants believe "unnecessary and useless" tests are

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[14] *See* Complaint ¶ 9, at 4-5, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed March 8, 1978); Affidavit of Charles H. Miller ¶ 10, at 6-7, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (E.D.N.Y., filed April 5, 1978).

[15] Appendix A; *see* note 2 *supra.*

[16] Defendants' Memorandum of Law, at 11, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed April 4, 1978).



being performed, their quarrel lies with the medical profession, not with Metpath.[17]

Defendants raise the spectre of physicians deluged with patients demanding that their doctors authorize HDL tests —all as a result of advertisements such as that proffered by Metpath.[18] The fallacy in this argument was exposed by the Supreme Court:

> [T]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.

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[17] In this regard, defendants have directed the Court's attention to a recent United States Senate Subcommittee Report. Senate Special Comm. on Aging, Subcomm. on Long-Term Care, Fraud and Abuse Among Clinical Laboratories, No. 94-944, 94th Cong., 2d Sess. (1976) ["Senate Report"]. The Senate Report details instances of widespread Medicaid fraud by clinical laboratories involving kickbacks to physicians and overpricing. After an intensive six-month investigation, *id.* at 47, the subcommittee did not recommend to the Congress any restrictions on advertising by clinical laboratories, *id.* at 49-50. More to the point, the Senate Report states that, according to Metpath's board chairman's testimony before the New Jersey Commission of Investigations in 1975, the company's New Jersey Medicaid revenues made up only a small part of its business because Metpath refused to participate in kickback arrangements. *Id.* at 38, 47.

[18] Not only are these arguments irrelevant to the question before the Court but they also call into question whether defendants' loyalty lies with the interests of the medical profession or with the interests of the people of the City of New York.

*Bates* v. *State Bar of Arizona*, 433 U.S. 350, 374-75, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977). Nor does this Court denigrate Metpath's desire to "reap financial profits" as such motivation is the basis of our free enterprise economy.

## CONCLUSION

In sum, the public interest allegedly served by this regulation causes no perceptible movement when placed in the scales opposite the public interest served by the first amendment to the Constitution. Consequently, the regulation challenged in this suit is unconstitutional on its face.

The Court is aware that new problems may result from an invalidation of defendants' ban on advertising to the general public. Most dangers will be alleviated, however, by the state's power to proscribe false, deceptive, or misleading advertising.[19] And, the clinical laboratory industry's instinct for self-preservation will encourage it to monitor closely its public advertising so as to maintain its protection under the Constitution. Defendants can no doubt be counted on for vigilance in punishing any overstepping. As to other potential problems, the suppression of information, in order to avoid its misuse, is a choice not open to defendants or to the Court: "It is precisely this kind of choice . . . that the First Amendment makes for us." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976).

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[19] *See Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383-84, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); N.Y.Gen. Business Law § 350 (McKinney 1968); N.Y.Penal Law § 190.20 (McKinney 1975).



Accordingly, the Clerk of the Court is directed to enter judgment declaring New York City Health Code § 13.21(h) unconstitutional and enjoining defendants from enforcing the prohibition against advertising to the public by clinical laboratories, as contained in that regulation.

Upon request of defendants, operation of the judgment is stayed, provided a prompt appeal is taken.[20]

The foregoing are the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52(a).

SO ORDERED.

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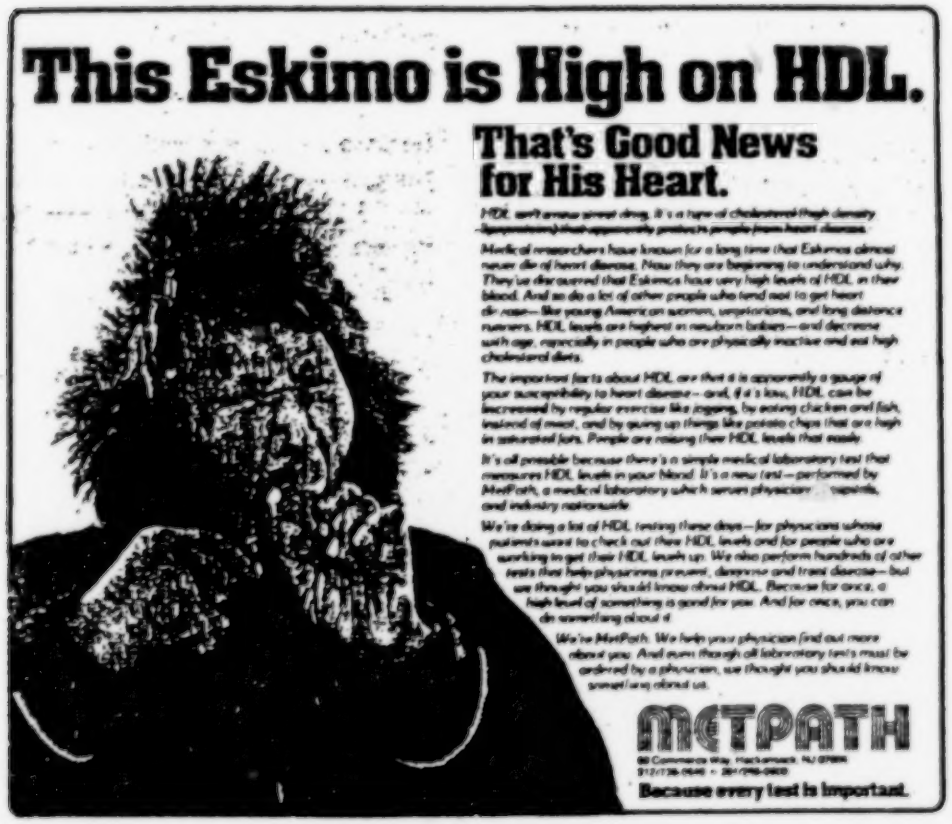
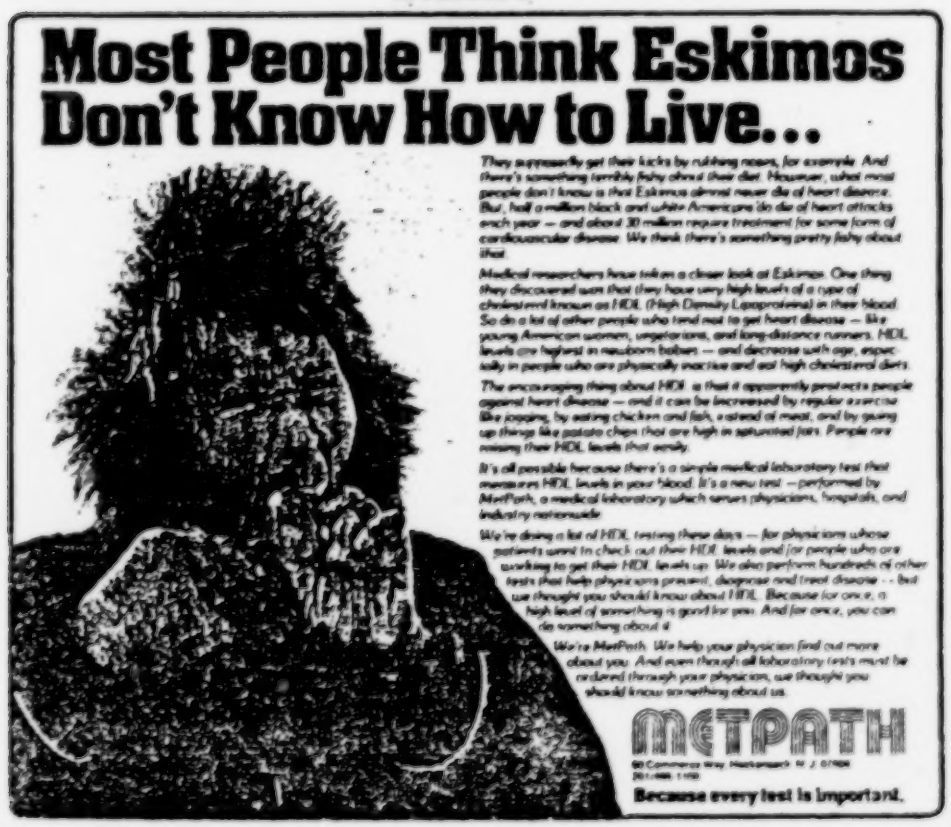
[20] [Stay vacated. Appeal voluntarily discontinued by stipulation and order, *Metpath Inc.* v. *Imperato*, 78 Civ. 1016 (JMC) (Filed May 18, 1978).]


This Eskimo is High on HDL.
That's Good News for His Heart.
HDL isn't some street drug. It's a type of cholesterol (high density lipoproteins) that apparently protects people from heart disease.
Medical researchers have known for a long time that Eskimos almost never die of heart disease. Now they are beginning to understand why. They've discovered that Eskimos have very high levels of HDL in their blood. And so do a lot of other people who tend not to get heart disease—like young American women, vegetarians, and long distance runners. HDL levels are highest in newborn babies—and decrease with age, especially in people who are physically inactive and eat high cholesterol diets.
The important fact about HDL is that it is apparently a gauge of your susceptibility to heart disease—and, if it's low, HDL can be increased by regular exercise like jogging, by eating chicken and fish, instead of meat, and by giving up things like potato chips that are high in saturated fats. People are raising their HDL levels that easily.
It's all possible because there's a simple medical laboratory test that measures HDL levels in your blood. It's a new test—performed by MetPath, a medical laboratory which serves physicians, hospitals, and industry nationwide.
We're doing a lot of HDL testing these days—for physicians whose patients want to check out their HDL levels and for people who are working to get their HDL levels up. We also perform hundreds of other tests that help physicians prevent, diagnose and treat disease—but we thought you should know about HDL. Because for once, a high level of something is good for you. And for once, you can do something about it.
We're MetPath. We help your physician find out more about you. And even though all laboratory tests must be ordered by a physician, we thought you should know something about us.
METPATH
Because every test is important.

APPENDIX B


Most People Think Eskimos Don't Know How to Live...
They supposedly get their kicks by rubbing noses, for example. And there's something terribly fishy about their diet. However, what most people don't know is that Eskimos almost never die of heart disease. But, half a million black and white Americans do die of heart attacks each year — and about 30 million require treatment for some form of cardiovascular disease. We think there's something pretty fishy about that.
Medical researchers have taken a closer look at Eskimos. One thing they discovered was that they have very high levels of a type of cholesterol known as HDL (High Density Lipoproteins) in their blood. So do a lot of other people who tend not to get heart disease — like young American women, vegetarians, and long-distance runners. HDL levels are highest in newborn babies — and decrease with age, especially in people who are physically inactive and eat high cholesterol diets.
The encouraging thing about HDL is that it apparently protects people against heart disease — and it can be increased by regular exercise like jogging, by eating chicken and fish, instead of meat, and by giving up things like potato chips that are high in saturated fats. People are raising their HDL levels that easily.
It's all possible because there's a simple medical laboratory test that measures HDL levels in your blood. It's a new test — performed by MetPath, a medical laboratory which serves physicians, hospitals, and industry nationwide.
We're doing a lot of HDL testing these days — for physicians whose patients want to check out their HDL levels and for people who are working to get their HDL levels up. We also perform hundreds of other tests that help physicians prevent, diagnose and treat disease — but we thought you should know about HDL. Because for once, a high level of something is good for you. And for once, you can do something about it.
We're MetPath. We help your physician find out more about you. And even though all laboratory tests must be ordered through your physician, we thought you should know something about us.
METPATH
Because every test is important.